MELOMBONG DAN PERUMAHAN SDN. BHD

v.

SUNTRA A/L THANGIAH & ANOR.

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[CIVIL SUIT NOS. 22-464-91
AND 22-466-91]
26 AUGUST 1992

LAND LAW: Occupation of land by defendants - Legitimised by payment of assessment and licence fees to local authority - Subsequent alienation of land to plaintiffs - Agreement for compensation - Plaintiffs required defendants to vacate the land - Whether agreement gave defendants an equity to remain on land till their claims were satisfied.

PRACTICE AND PROCEDURE: Summary Judgment - Appeal against order of Registrar granting judgment - Non-disclosure of defence - Affidavit-in-support - Plaintiffs knew or ought to have known that defendants have an arguable defence - Effect of such knowledge.

The defendants were long-time lawful occupiers of land (the said land) in the Mukim of Ampang which occupation had been legitimised by payment of assessment rates and licence fees to the local authority up to the end of 1987.

However, the land was alienated to the plaintiffs in 1986 with permission to develop the said land into a housing estate. The plaintiffs entered into an agreement with the defendants. The defendants claimed, as a precondition to their vacating their premises, they were to be paid compensation, given alternative accommodation and a discount of RM2,500 for the purchase of a low cost flat.

The plaintiffs later contended that they were no longer bound by the agreement because the defendants had failed to vacate when required to do so. In 1991 the plaintiffs sought for, and obtained, a summary judgment against the defendants from the Registrar. The defendants appealed, and applied for a stay of execution. The plaintiffs objected to the stay and for the first time disclosed the agreement in their affidavit.

The essence of the plaintiffs' case was that the defendants were trespassers on the said land and more so when they refused to vacate when so required by the plaintiffs. However, the plaintiffs had failed to disclose the existence of the agreement in their statement of claim and affidavit in support of summary judgment. Further in the affidavit-in-support, the plaintiff's building manager affirmed there was no defence. They also failed to disclose that the defendants were the lawful occupiers of land.

The issue was whether the defendants had an arguable defence about which the plaintiffs had known or ought to have known all along.

Held:

[1] Issues raised clearly showed that the defendants had an arguable defence about which the plaintiffs had known or ought to have known all along. Therefore to apply for a summary judgment, which is a drastic remedy designed for drastic situations, when the plaintiffs knew or ought to have known that the defendants had an arguable defence could amount to an abuse of process. It was the duty of the plaintiffs to disclose it at least in their reply to the defendants' affidavit. That is why the rules insist that the supporting affidavit must contain an averment that the plaintiff verily believes that there is no defence to the action.

[2] The defendants were entitled to contend that the agreement gave them an equity to remain on the land till their claims were satisfied on the basis that it was a condition precedent to their vacation of the said land. In *Mok Deng Chee v. Yap See Hoi & Ors.*, the Federal Court had decided that a tenancy coupled with an equity cannot be determined by a bare notice to quit.

[Appeal allowed. Summary Judgment set aside. Defendants given leave to file defence and counterclaim. Execution proceedings set aside]

Cases referred to:

Ladd v. Marshall [1954] 1 WLR 1489 ***(refd)***

Lim Hock Kim v. Sim Seng Quee [1982] 2 MLJ 210 ***(refd)***

Kalimuthu v. Kandiah [1990] 2 MLJ 217 ***(refd)***

Mok Deng Chee v. Yap See Hoi & Ors. [1981] 2 MLJ 321 ***(foll)***

Other source referred to:
Chitty on Contracts 25th edn. para 513

For the plaintiffs - V.S. Visvanathan (Lim Chong Leong with him); M/s. T.H. Su & Co.
For the defendants - Roslind Thomas; M/s. Christie Soothay Nathan & Associates

JUDGMENT

Mahadev Shankar J:
For the best part of their lives the defendants were each living in wooden dwelling-houses on small individual portions of a large tract of land in the Mukim of Ampang (the said land). Their occupation was legitimised by assessment, and licence fees which they paid and continued to pay the local authority up to the end of 1987. It cannot be controverted that they were in lawful occupation of the individual portions of the said land which was in their possession.

In 1986 the said land was alienated to the plaintiffs under four qualified titles together with a development order which permitted the plaintiffs to convert the said land to a housing estate.

The presence of the defendants and many other occupants hampered the expeditious progress of the development. So they had to be moved. The plaintiffs were legally represented. They prepared a standard agreement which is in English. It was couched in rather technical language. On or about 18 July 1991 the plaintiffs or their solicitors obtained the defendants signatures on this agreement (the agreement).

The defendants were not independently advised. Admissions against their personal and proprietory interests are contained in the agreement which they claim they did not understand. They claim that a copy of the agreements they signed was not given to them. (Some legal repercussions for this state of affairs can be seen in **Chitty on Contracts** 25th edn. para 513 - "Independent advice"). In this Court the defendants claim that as a precondition to their vacating their premises they should be paid RM4,000, given alternative accommodation, and a discount of RM2,500 each for the purchase of a low cost flat to be built by the plaintiffs.

But these terms did not materialise. The plaintiffs claim they are no longer bound by the agreement because the defendants failed to vacate when they were required to. The defendants contend that they are not obliged to vacate unless they are first paid the compensation they are entitled to, and given alternative accommodation. Furthermore, they claim that contrary to the clear terms of the written agreement they were never given written notice to vacate as the plaintiffs were obliged to do under the terms of the agreement. The plaintiffs say they did send such a notice on 18 September 1991 but there is no evidence whatsoever before this Court that the notice was served.

In November 1991 the plaintiffs filed these actions. The essence of their case as averred in the statement of claim is that the defendants were always trespassers on the land, and the more so when they refused to vacate when so required by the plaintiffs. No reference whatsoever was made to the agreement in the statement of claim or in the affidavit-in-support of summary judgment. No disclosure was ever made that the defendants had built their houses quite legally and had remained there legally without harassment until the plaintiffs required them to move. Nor was it disclosed that at no time were the plaintiffs ever in actual physical possession of the areas occupied by the defendants which is still in their possession to this day. In short the plaintiffs' case is based upon the alienation of the land to them for which they now hold the qualified titles.

When plaintiffs' Counsel was asked why he had not disclosed the matters aforesaid relating to the agreement in his statement of claim or affidavit-in-support of summary judgment he said this was not necessary because he had opted to sue for trespass.

However I must emphasise that summary judgment is a drastic remedy designed for drastic situations. To apply for it when the plaintiffs know or ought to know that the defendants have an arguable defence can amount to an abuse of process. That is why the rules insist that the supporting affidavit must contain an averment that the plaintiff verily believes that there is no defence to the action. (See my Judgment in RS. 11-4-91)

In the affidavit-in-support (Enc. 4 para 11) the plaintiff's building manager affirmed there

was no defence, **except for the damages which has not yet been ascertained**. (Emphasis added)

Obviously if the defendants were entitled to damages or compensation this was a triable issue. The defendants affidavit to show cause asserted that they had lived on the land all their lives, denied they were trespassers and claimed that they should not be moved unless they had been relocated and compensated. They raised this issue but based it upon an assumption that the authorities would not have granted the plaintiff's permission to take over the site unless these matters were first attended to.

The Registrar gave summary judgment for the plaintiffs. The defendants appealed, and applied for a stay of execution. The plaintiffs objected to the stay and for the first time disclosed the agreement in their supporting affidavit.

By this stage there had been a change in the firm of Solicitors for the defendants. A fresh affidavit was sworn to permit evidence to be led of the issues arising from this agreement both in regard to the appeal against the refusal to say execution and in the appeal proper against summary judgment.

Strenuous objections were taken to the admissibility of the agreement and the issues therefrom based on the line of cases starting with *Ladd v. Marshall* [1954] 1 WLR 1489.

I overruled these objections and permitted these issues to be raised before me because they clearly showed that the defendants had an arguable defence about which the plaintiffs had known or ought to have known all along. The averment that to his honest belief there is no defence is not to be lightly made. In the present case it was the duty of the plaintiffs to disclose it at least in their reply to the defendants' affidavits claiming he was entitled to compensation and relocation.

As the defence has put it this was a condition precedent to vacation, and even if the defendants were trespassers as alleged by the plaintiffs, (and I do not decide that now) they were entitled to contend that the agreement gave them an equity to remain on the land till their claims were satisfied.

Matters were exacerbated by the plaintiffs claiming that the defendants were now entitled to nothing and if they did not obey the behests of the plaintiffs to remove themselves they should be ejected by this Court without compensation.

I am not prepared to be so dogmatic. The defendants are fighting for survival, whilst the plaintiffs corporation has perpetual life as long as its ventures are profitable. The submission that the plaintiffs are being held to ransom is not helpful. The defendants could contend likewise perhaps with greater force. There are cases to the effect that where a land owner permits a person to put up a structure on the land, and occupy it, that person can obtain an equity in terms of a licence coupled with an interest, which is capable of compensation if he should be required to vacate: See *Lim Hock Kim v. Sim Seng Quee* [1982] 2 MLJ 210; *Kalimuthu v. Kandiah* [1990] 2 MLJ 217; and especially *Mok Deng Chee v. Yap See Hoi & Ors.* [1981] 2 MLJ 321 where it was held that a tenancy coupled with an equity cannot be determined by a bare notice to quit. This last case is a Federal Court decision binding on me.

I therefore allowed the appeal and set aside the summary judgment. I gave leave to the defendants to file their defence and counterclaim and set aside the execution proceedings initiated by the plaintiffs. I also made the appropriate orders for costs.